IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 18

BRIEF FOR PETITIONER

INDEX

SUBJECT INDEX

	Page
BRIEF FOR PETITIONER:	
Opinions Below	1
Jurisdiction	2
Statutes Involved	2
Questions Presented	4
Statement	5
Summary of Argument	9
Argument:	
I. The trial court disregarded the evidence in directing a verdict for respondent	12
A. Whether petitioner misrepresented as to material facts with knowledge of their falsity and with intent to deceive were questions for the jury	12
B. It was for the jury to decide whether petitioner's employment was because of respondent's reliance on his representations	23
(1) Petitioner's employment in 1958 was not in reliance on his 1951 application	25
(2) Respondent knew or should have known of petitioner's condition	26
(3) Respondent did not rely on petitioner's representations when it hired him in 1951	28
II. The trial court erroneously interpreted the law in directing a verdict for respondent	32
Conclusion	43

CITATIONS

CASES:

	Page
Andrus v. *St. Louis Smelting & Refining Co.*, 130 U.S. 643	24
Arnold v. *Panhandle & S. F. Ry.*, 353 U.S. 360	13
Bailey v. *Central Vt. Ry.*, 319 U.S. 350	9, 13
Baker v. *Texas & Pac. Ry.*, 359 U.S. 227	13, 33
Blanton v. *Northern Pac. Ry.*, 215 Minn. 442, 10 N.W.2d 382 (1943)	29, 39, 40, 41
Boshaw v. *J. J. Newberry Co.*, 259 Mich. 333, 243 N.W. 46 (1932)	35, 38
Butler v. *Whiteman*, 356 U.S. 271	13
Carter v. *Peoria & P. U. Ry.*, 275 Ill. App. 298 (1934)	29, 39, 40
Casso v. *Pennsylvania R.R.*, 219 F.2d 303 (3rd Cir. 1955)	24, 29, 39, 40, 41
Chiodo v. *Whitehead & Kales Co.*, 327 Mich. 499, 42 N.W.2d 238 (1950)	26
Clark v. *Union Pac. R.R.*, 70 Ida. 70, 211 P.2d 402 (1949)	15, 24, 39, 41
Dalhoff Const. Co. v. *Block*, 157 Fed. 227 (8th Cir. 1907)	25
Davis v. *Virginian R.R. Co.*, 361 U.S. 354	13
Dawson v. *Texas & Pac. Ry. Co.*, 123 Tex. 191, 70 S.W.2d 392 (1934), *cert. denied*, 293 U.S. 580	39, 40
Deen v. *Gulf, C. & S. F. Ry.*, 353 U.S. 925	13
Dice v. *Akron, C. & Y. R.R.*, 342 U.S. 359	13
Edwards v. *United States*, 140 F.2d 526 (6th Cir. 1944)	22
Ellis v. *Union Pac. R.R.*, 329 U.S. 649	13
Eresafe v. *New York, N. H. & H. R.R.*, 250 F.2d 619 (2nd Cir. 1957)	39, 40
Ettelson v. *Metropolitan Life Ins. Co.*, 164 F.2d 660 (3rd Cir. 1947)	21
Farnsworth v. *Duffner*, 142 U.S. 43	25
Farrar v. *Churchill*, 135 U.S. 609	13-14, 24
Ferguson v. *Moore-McCormack Lines*, 352 U.S. 521	13
Ferguson v. *St. Louis-S. F. Ry.*, 356 U.S. 41	13

Page

Fort Worth & D. C. Ry. v. *Griffith*, 27 S.W.2d 351 (Tex. Civ. App. 1930) 37, 39, 40, 41
Ganga v. *Ford Motor Co.*, 250 Mich. 247, 230 N.W. 159 (1930) 37, 38, 39, 40, 41
Gibson v. *Thompson*, 355 U.S. 18 13
Gunning v. *Cooley*, 281 U.S. 90 12
Honeycutt v. *Wabash Ry.*, 355 U.S. 424 13
Hull v. *Philadelphia & R. Ry.*, 252 U.S. 475 ..... 32, 33
Inman v. *Baltimore & O. R.R.*, 361 U.S. 138 13
Kansas City M. & O. Ry. v. *Estes*, 203 S.W. 1155 (Tex. Civ. App. 1918), *aff'd*, 228 S.W. 1087 (1921) 26
Kernan v. *American Dredging Co.*, 355 U.S. 426 32
Laughter v. *Powell*, 219 N.C. 689, 14 S.E.2d 826, 136 A.L.R. 1116 (1941), *cert. denied*, 314 U.S. 666 ..... 33, 38, 40
Lavender v. *Kurn*, 327 U.S. 645 13
Lehigh Zinc & Iron Co. v. *Bamford*, 150 U.S. 665 22
Long v. *Big Horn Construction Co.*, 75 Wyo. 276, 295 P.2d 750 (1956) 38, 40, 41, 42
Matthews v. *Atchison, T. & S. F. Ry.*, 54 Cal. App.2d 549, 129 P.2d 435 (Super. Ct. 1942) 15, 39, 40, 41, 42
McBride v. *Toledo Terminal R.R.*, 354 U.S. 517 13
Michalic v. *Cleveland Tankers, Inc.*, 364 U.S. 325 13
Minneapolis, St. P. & S. Ste. M. R.R. v. *Borum*, 286 U.S. 447 ..... 29, 36, 37, 41
Minneapolis, St. P. & S. Ste. M. Ry. v. *Rock*, 279 U.S. 410 ..... 10, 11, 25, 29, 34, 35, 36, 37, 38, 41
Moore v. *Terminal R.R. Ass'n*, 358 U.S. 31 13
Moulor v. *American Life Ins. Co.*, 111 U.S. 335 21
Neuckirk v. *Los Angeles Junction Ry.*, 21 Cal.2d 308, 131 P.2d 535 (1942) 38-39, 40
Norfolk & W. Ry. Co. v. *McKenzie*, 116 F.2d 632 (6th Cir. 1941) 15
Payne v. *Daugherty*, 283 Fed. 353 (8th Cir. 1922) 11, 33, 34, 36
Phillips v. *Southern Pac. Co.*, 14 Cal. App.2d 454, 58 P.2d 688 (App. Div. 1936) 39, 40, 41

Page

Plick v. *Toye Bros. Auto & Taxicab Co.*, 13 La. App. 525, 127 So. 59 (1930) 36, 37, 39, 40-41
Powers v. *Michigan Cent. R.R.*, 268 Ill. App. 493 (1932) 39, 40
Prudential Ins. Co. v. *Gourley*, 267 F.2d 156 (5th Cir. 1959) 22
Qualls v. *Atchison, T. & S. F. Ry.*, 112 Cal. App. 7, 296 P. 645 (App. Div. 1931) 36, 39, 40
Ringhiser v. *Chesapeake & O. Ry.*, 354 U.S. 901 13
Ritter v. *Mutual Life Ins. Co.*, 169 U.S. 139 37
Robinson v. *Baltimore & O. R.R.*, 237 U.S. 84 33
Rogers v. *Missouri Pac. R.R.*, 352 U.S. 500 13
Sentilles v. *Inter-Caribbean Corp.*, 361 U.S. 107 13
Shappirio v. *Goldberg*, 192 U.S. 232 ..... 24, 25
Shelton v. *United States*, 169 F.2d 665 (D.C. Cir. 1948), *cert. denied*, 335 U.S. 834 15
Slaughter's Adm'r v. *Gerson*, 80 U.S. (13 Wall.) 379 24
Sonnentheil v. *Moerlein Brewing Co.*, 172 U.S. 401 14
Southern Dev. Co. v. *Silva*, 125 U.S. 247 ..... 14, 22, 24
Southern Pac. Co. v. *Libbey*, 199 F.2d 341 (9th Cir. 1952) 41
Stinson v. *Atlantic Coast Line R.R.*, 355 U.S. 62 13
Talarowski v. *Pennsylvania R.R.*, 135 F. Supp. 503 (D. Dela. 1955) 39, 41
Tennant v. *Peoria & P. U. Ry.*, 321 U.S. 29 13
Texas & N. O. R.R. v. *Webster*, 123 Tex. 197, 70 S.W.2d 394 (1934), *cert. denied*, 293 U.S. 580 ..... 37, 39, 40
Thomson v. *Texas & Pac. Ry.*, 353 U.S. 926 13
United States v. *Kelley*, 136 F.2d 823 (9th Cir. 1943) 22
United States Bank v. *Owens*, 27 U.S. (2 Pet.) 527 37
Webb v. *Illinois Cent. R.R.*, 352 U.S. 512 13
White v. *Thompson*, 181 Kan. 485, 312 P.2d 612 (1957) 39, 40
Wilkerson v. *McCarthy*, 336 U.S. 53 12

Page

STATUTES:

28 U.S.C. §1257(3) (1959) 2
45 U.S.C. §51 (1959) (Federal Employers' Liability Act) 2, 32
45 U.S.C. §55 (1959) 3
32 Stat. 232 32

MISCELLANEOUS:

Annot., *Misrepresentations in Seeking Employment*, 116 A.L.R. 1116 (1942) 40
Copp, *How Best to Check Up Applications for Train and Switching Service—What Safeguards Should Be Employed*, Thirty-eighth Annual Meeting of the Association of Railway Claim Agents, 81, 82 (1927) 30
DeParcq, *A Decade of Progress Under the Federal Employers' Liability Act*, 18 Law and Contemp. Prob. 257 at 260 (1953) 13
Griffith, *The Vindication of a National Public Policy Under the Federal Employers' Liability Act*, 18 Law and Contemp. Prob. 160 (1953) 32
1 Harper and James, Torts (1956)
§7.12 24
§7.13 25
Merrill, *Misrepresentation to Secure Employment*, 14 Minn. L. Rev. 646 (1930) 35
43 Harv. L. Rev. 141 (1930) 35
28 Mich. L. Rev. 357 (1930) 35
14 Minn. L. Rev. 98 (1930) 35
Note, 69 Harv. L. Rev. 1441, 1447 (1956) 13
3 Pomeroy, Equity Jurisprudence, §899 (5th ed. 1941) 34
Prosser, Torts (2d ed. 1955)
§86 14
§89 ..... 24, 25
Rates of Pay and Regulations, Norfolk & Western Ry. Co., Revised Dec. 27, 1943 29
2 Restatement of Contracts §475 34

Page

Tate, *The Physical Fitness and Judicious Selection of New Employees*, 32 The Bulletin, The Association of Railway Claim Agents, 291-299 (Jan. 1948) 30

5 Williston, Contracts (rev. ed. 1937)
§1488 ..... 33, 34
§1491 22

X-rays of the Spine in Pre-Employment and Periodic Examinations, Proceedings the Thirty-seventh Annual Meeting of the Medical and Surgical Section, Association of American Railroads, 45-54, 61, 62 (1957) 31

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 48

CARL STILL,

Petitioner,

v.

NORFOLK & WESTERN RAILWAY COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF APPEALS OF THE STATE OF WEST VIRGINIA

BRIEF FOR PETITIONER

Opinions Below

The judgment of the Circuit Court of Mercer County, West Virginia is unreported. It is printed at pages 19 and 465 of the Transcript of Record. A petition for Writ of Error and Supersedeas was filed in the Supreme Court of Appeals of West Virginia but denied by that court without opinion. The Clerk's memorandum of the court's judgment is printed at page 510 of the Transcript of Record.

Jurisdiction

The judgment of the Supreme Court of Appeals of West Virginia was entered September 12, 1960 (R. 510). By Order dated December 1, 1960, the time for filing petition for writ of certiorari was extended by the Chief Justice to and including February 10, 1961 (R. 511). The Petition for a Writ of Certiorari was filed February 10, 1961, and was granted April 17, 1961 (R. 512). Petitioner's Motion for Leave to Proceed in Forma Pauperis was granted June 19, 1961 (R. 512).

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3) (1959).

Statutes Involved

45 U.S.C. §51 (1959) (Federal Employers' Liability Act):

> "Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; definition of employees.
>
> "Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none,

then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

"Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter."

45 U.S.C. §55 (1959):

"Contract, rule, regulation, or device exempting from liability; set off.

"Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void: *Provided*, That in any action brought against any such common carrier under or by virtue of any of the provisions of this chapter, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought."

Questions Presented

1. In a Federal Employers' Liability Act case, did the trial court err in directing a verdict for the respondent railroad on the ground that the petitioner employee, because of alleged misrepresentations relating to his health and physical condition, made when he applied for employment, failed to achieve the status of an employee where:

(a) The evidence corroborated petitioner's testimony that he had not intended to mislead or misrepresent anything to respondent, and the evidence supported the conclusion that he had not misled or misrepresented.

(b) Petitioner worked satisfactorily for respondent for more than 5 years prior to the accident;

(c) The alleged misrepresentations were made more than 6 years prior to the accident, during which period respondent had fired and rehired petitioner after more than a year's absence;

(d) The principal alleged misrepresentation related to a pre-existing physical condition which was plainly visible when petitioner was examined and approved by respondent's examining physician who by his own admission was overworked at the time of the examination;

(e) Except for such physical examination, respondent made no investigation of petitioner's application, even though the most cursory investigation would have disclosed the condition now claimed to have been concealed; and

(f) Considerations of public policy militate in favor of recovery by the petitioner and against absolving respondent of responsibility for its negligence.

2. Assuming an employee obtains a job with a railroad by fraudulently concealing an abnormality in his back, but

is physically examined by the carrier and does nothing to limit or interfere with such examination and investigation as the carrier chooses to make, performs his duties satisfactorily for a number of years, and is thereafter injured as the result of the carrier's negligence, is he an employee entitled to the protection of the FELA?

Statement

This is an action for personal injuries brought under the Federal Employers' Liability Act by a brakeman injured in a collision between a train and a railroad car on which he was riding (R. 1). At the conclusion of the evidence the trial court directed a verdict for respondent, on the ground that petitioner's employment contract was void because procured by fraud (R. 473).

Petitioner was permanently injured on January 23, 1958, in an accident which occurred shortly after midnight, in respondent's yard at Bluefield, West Virginia, in the course of a switching operation. Cars were being detached from a train of approximately 69 cars, which was being pushed on a "lead track" in a westerly direction by an engine at the east end (R. 84, 134, 148, 346). As the train moved, cars were separated or "cut" from it after it passed the "hump", the highest point in the yard, from which the tracks sloped to the east and west (R. 84, 96, 116, 147); after being uncoupled, the "cut" descended by gravity to its designated side track (R. 149). The cut cars were supposed to roll away from the train (R. 355, 362).

At the time of the accident, petitioner was standing on a small, exposed platform at the rear of a 70-ton coal hopper which had been "cut"; unfit for further service, it was being switched to a shop track for ultimate junking

(R. 67, 106, 132, 153, 161, 354, 365). Petitioner could brake but not accelerate (R. 159).

One group of cars had been cut from the train just ahead of the car petitioner was riding (R. 157, 359). Soon after his car rolled free, but unexpectedly and contrary to the established procedure, it was overtaken and violently recoupled by the train (R. 86, 99, 117, 131, 139, 355, 360). The recoupling, followed by a sudden halt, caused a whiplike, jerking reaction which threw petitioner heavily against his car; almost over into it; his side, from waist to knee, struck a steel rim (R. 85, 87, 92, 98, 117, 132, 163, 271, 273, 366).

The switching operation was directed by a brakeman acting at the time as an extra conductor (R. 354). He called the designated side track to the brakeman as his car or cars rolled by (R. 100, 354), and controlled the movement of the train by throwing signal lights on several boards located throughout the yard (R. 85, 96, 115, 149). The conductor, whose duty was to prevent recoupling (R. 92, 98, 159, 360), realized a collision was impending but did not warn petitioner, though he was able to do so (R. 119, 355-358, 363-368). He testified that he delayed signalling the engineer to stop, since every stop slowed up the switching operation (R. 355, 364). There was evidence too that the engineer was known to be inefficient and that he failed to abide the signal thrown by the conductor (R. 87, 97, 99, 110-112, 122, 158, 162, 197, 268, 350, 370, 453).

Petitioner suffered severe and permanent injury as a result of the accident.

His physical fitness prior to the accident is well demonstrated by his employment record. A Negro, aged 31 at the time of the accident, petitioner was a manual laborer. He did not complete high school (R. 200, 479). He had

his first job, at 18, in the coal mines (R. 202). His next job was making bomb shells (R. 201), and he apparently worked a short time for respondent in 1943 (R. 353). When he was 19 years old, on July 18, 1945, he entered the Army (R. 201). During basic training as a soldier he experienced no difficulty performing his duties (R. 204, 206), although later in the Service he had physical difficulties, as the result of which he was given an Honorable Discharge on January 31, 1946, pursuant to a Certificate of Disability (R. 201, 208; Def. Ex. 3; R. 213, 477; Def. Ex. 12; R. 304, 493). After working thereafter, for about two years, as a janitor (R. 142, 216), he again worked briefly for respondent (R. 353) and then returned to working in the mines, "where the work is about three times as hard as the railroad," dusting the cut, working as a brakeman behind a loading machine, loading coal, laying track and handling timbers weighing 40 to 50 pounds (R. 142-144, 217). On July 24, 1951, he was employed by respondent as a brakeman; in October 1956 he was dismissed for deserting his crew (R. 144, 293) and in November 1957 he was reinstated (R. 144, 145, 294). Petitioner experienced no trouble doing the heavy physical labor which these jobs required (R. 144-146, 165, 220).

From July 1951 to October 1956 and from November 1957 to January 1958, the periods petitioner worked for respondent as a brakeman, he performed his duties in a satisfactory manner and was considered a good and competent brakeman (R. 89, 100, 109, 122, 199, 397). His physical condition was considered good by his fellow employees and also by his superiors (R. 89, 110, 122, 199, 397); he was one of the railroad's strongest and most agile brakemen (R. 110, 194, 196).

The accident brought about a severe and permanent injury to petitioner's spinal column, a marked slipping or

dislocation of his vertebra, with injury to the intervertebral disc (R. 54, 55, 60, 70, 73, 81, 324, 435, 456) and painful nerve damage (R. 56, 73, 76). Petitioner had a back deformity, known as spondylolisthesis,[1] which was of long standing and probably was congenital, and there was some disagreement as to whether the effect of the accident was merely to aggravate a quiescent condition without affecting the bone structure or to cause a complete dislocation of the bones involved (R. 60, 79, 80, 81, 244, 324, 434). But in any event it was clear that petitioner became totally disabled from performing physical labor, the only type of work he knew (R. 57-60, 70, 77, 183, 193, 323, 458; but see 243, 325). The doctors disagreed as to whether an operation might improve his condition (R. 58, 59, 74, 78, 81, 321, 324).

The pain caused petitioner by the accident was vividly described by a number of witnesses. According to the doctors the trauma affected his spinal nervous system. As a result, commencing immediately after the accident, he suffered from severe pain and limitation of motion (R. 57, 98, 101, 104, 119-121, 132, 135, 165-167, 172, 181, 191). He continued in pain at the time of the trial, when he was still required to wear a heavy brace (R. 73, 76, 77, 190, 196, 289) and was unable to remain still for any extended time (R. 143, 155, 194).

Respondent took the position at the trial that since petitioner worked, "in a sense, of course, he was an employee" (R. 46), but because of his fraud no valid agreement ex-

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[1] Spondylolisthesis was defined at the trial as a slipping forward of one vertebra on another. In this case the evidence was that petitioner's fifth lumbar vertebra, the one just above the pelvis, was slipped forward on his sacrum (R. 55, 56, 62, 70, 71, 235, 239, 442).

isted and he could not maintain an action under the FELA[1] (R. 29, 35). At the conclusion of the evidence respondent moved for a directed verdict (R. 462).

Despite petitioner's categorical denial of intent to mislead or misrepresent (R. 460) and evidence corroborating his denial, the trial court accepted respondent's theory and directed a verdict for respondent (R. 19-22, 465-474).

Summary of Argument

Petitioner is a manual laborer. Hired by respondent in 1951 as a brakeman, fired in 1956 for deserting his crew, and rehired in 1957, he was injured in 1958 in an accident caused without negligence on his part. During the periods of his employment his services were satisfactory. As a result of the accident he suffered a permanent disability of his lower back, rendering him unable to perform manual labor.

Respondent claimed petitioner was not an employee because he falsely answered a number of questions when he applied for work in 1951. It claimed essentially that he concealed the fact that he had a congenital defect at the point of his back where he was disabled. The trial court directed a verdict for respondent on this issue. In so doing it deprived petitioner of a goodly portion of the relief which Congress afforded railroad workers under the FELA. *Bailey* v. *Central Vt. Ry.*, 319 U.S. 350, 354.

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[1] This defense was injected for the first time on October 5, 1959, the day the trial commenced, notwithstanding an oral stipulation between the parties on August 10, 1959, and a written stipulation filed on September 10, 1959, that petitioner was an employee (R. 40, 22, 41, 18), and the fact that counsel for respondent had some of the information upon which the plea was based when he made the August 10, 1959, stipulation at pre-trial and had additional information at least a week before the trial (R. 42, 43, 422, 456, 463).

There was evidence that petitioner had trouble with his back prior to 1951, but the proof was persuasive that he did not understand its nature, and thought he had recovered from it. As to each question which respondent claimed petitioner answered fraudulently, there was an explanation, corroborated by other testimony and evidence, reasonably eliminating any inference that he answered falsely or with intent to deceive.

Moreover, the evidence strongly suggested, indeed established, that petitioner's employment in January 1958, the time of the accident, was not in reliance on his 1951 application. He had been fired and rehired in the interim, without reliance on his 1951 statements. Further the conclusion was inescapable that when he was employed in 1951, there was no reliance on the representations respondent claims to have been false. Respondent, despite petitioner's representations, insisted on having him thoroughly examined by its own physician. The doctor, however, failed to discover the obvious abnormality in petitioner's spine, which was visible without X-ray.

Further, though the most cursory investigation by respondent, such as examination of his certificate of discharge from the United States Army or a telephone call to the local VA doctor whom petitioner gave as reference, would have disclosed his condition, no investigation whatever was made. By this inexcusable disregard of its unquestioned duty to exercise care in hiring fit people, *Minneapolis, St. P. & S. Ste. M. Ry.* v. *Rock*, 279 U.S. 410, respondent had imputed to it the knowledge which it would have acquired by such inquiry and therefore cannot be said to have relied on petitioner's representations.

Petitioner therefore urges that the trial court erred by taking these issues from the jury. But even assuming the evidence had been such as to justify a finding that peti-

tioner obtained employment by fraud, he nevertheless was an employee entitled to the protection of the FELA. That he was in fact an employee is not disputed. If he perpetrated a fraud on respondent, it was at most as inducement to the contract, which may have entitled respondent to rescind, but which did not affect his status at the time of the accident. *Payne* v. *Daugherty*, 283 Fed. 353 (8th Cir. 1922).

To deprive petitioner of the benefits of the FELA, therefore, there must be found to exist some consideration of overriding importance, some factor which reasonably might be said to overcome the purpose of the FELA to protect those who work in a hazardous, public service industry. No such factor appears in this case.

Relying on *Minneapolis* v. *Rock, supra*, respondent argues petitioner's fraud was such a factor. But that case involved a physically unfit employee who fraudulently arranged for someone else to take the required physical examination which he had failed. By avoiding the examination he prevented the railroad from physically examining him and thus from exercising care in hiring fit employees, which it was duty bound to do, and he thereby violated the public policy of the FELA.

Petitioner's fraud, if conceded (and it is not conceded), was not of this nature. It is undisputed that he submitted himself to physical examination and to such investigation as respondent desired to make. Moreover, he worked satisfactorily for more than 5 years prior to the accident and his condition, allegedly concealed, in no way contributed to the accident. It cannot be said any consideration of public policy would justify a limitation of the protection to which he was entitled as an employee.

On the contrary, to deprive petitioner of his rights under the FELA would run contrary to the purpose of the Act

to promote safety by stimulating carriers to exercise care in hiring fit workers. *Minneapolis* v. *Rock, supra.* In this case respondent's negligence caused petitioner's injury. To absolve respondent of responsibility when it had full opportunity to examine and investigate petitioner and to learn of the condition of which it now complains would give respondent a windfall it does not deserve and would in fact encourage lax hiring procedures in the industry.

For these reasons petitioner maintains this case should be reversed and remanded for a new trial, with instructions to the trial court to entertain favorably a motion by petitioner to strike the defense of fraud heretofore interposed by respondent.

ARGUMENT

I

The Trial Court Disregarded the Evidence in Directing a Verdict for Respondent.

A. Whether petitioner misrepresented as to material facts with knowledge of their falsity and with intent to deceive were questions for the jury.

Petitioner was deprived of his right to trial by jury, guaranteed by the FELA, when the trial court purported to resolve factual issues against him by directing a verdict for respondent. In its consideration of the Motion for Directed Verdict, the trial court was bound, after considering the evidence in the light most favorable to petitioner, *Gunning* v. *Cooley*, 281 U.S. 90, to determine whether or not, with reason, a conclusion favorable to petitioner might be drawn on the factual issues. Only if reasonable men could not reach differing conclusions on an issue may it be taken

from the jury.[3] Moreover, the court's action is to be reviewed in light of the admonition that the right to trial by jury "is part and parcel of the remedy afforded railroad workers under the Employers Liability Act," and to deprive "these workers of the benefit of a jury trial in close or doubtful cases is to take away a goodly portion of the relief which Congress has afforded them." *Bailey* v. *Central Vt. Ry.*, 319 U.S. 350, 354.

These principles apply not only to questions of negligence and causation but to all factual issues, *Tennant* v. *Peoria & P. U. Ry.*, 321 U.S. 29, 35, including fraud in procurement of a release from an employee, *Dice* v. *Akron, C. & Y. R.R.*, 342 U.S. 359, 363, and whether an injured worker was an employee of a railroad or of a company which contracted to do certain work on its roadbed, *Baker* v. *Texas & Pac. Ry.*, 359 U.S. 227, 228, and including too, therefore, the issues involved in respondent's claim of fraud.

Fraud is never presumed, and where it is alleged the facts sustaining it must be clearly made out. *Farrar* v.

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[3] *Michalic* v. *Cleveland Tankers, Inc.*, 364 U.S. 325; *Davis* v. *Virginian R.R.*, 361 U.S. 354, 356; *Sentilles* v. *Inter-Caribbean Corp.*, 361 U.S. 107, 110; *Inman* v. *Baltimore & O. R.R.*, 361 U.S. 138, 140; *Baker* v. *Texas & Pac. Ry.*, 359 U.S. 227, 228; *Moore* v. *Terminal R.R. Ass'n*, 358 U.S. 31; *Butler* v. *Whiteman*, 356 U.S. 271; *Ferguson* v. *St. Louis-S. F. Ry.*, 356 U.S. 41; *Honeycutt* v. *Wabash Ry.*, 355 U.S. 424; *Stinson* v. *Atlantic Coast Line R.R.*, 355 U.S. 62; *Gibson* v. *Thompson*, 355 U.S. 18; *McBride* v. *Toledo Terminal R.R.*, 354 U.S. 517; *Ringhiser* v. *Chesapeake & O. Ry.*, 354 U.S. 901; *Deen* v. *Gulf, C. & S. F. Ry.*, 353 U.S. 925; *Thomson* v. *Texas & Pac. Ry.*, 353 U.S. 926; *Arnold* v. *Panhandle & S. F. Ry.*, 353 U.S. 360; *Webb* v. *Illinois Cent. R.R.*, 352 U.S. 512, 516; *Ferguson* v. *Moore-McCormack Lines*, 352 U.S. 521, 523; *Rogers* v. *Missouri Pac. R.R.*, 352 U.S. 500, 506; *Wilkerson* v. *McCarthy*, 336 U.S. 53; *Ellis* v. *Union Pac. R.R.*, 329 U.S. 649; *Lavender* v. *Kurn*, 327 U.S. 645; *Tennant* v. *Peoria & P. U. Ry.*, 321 U.S. 29; DeParcq, *A Decade of Progress Under the Federal Employers' Liability Act*, 18 Law and Contemp. Prob. 257, 260 (1953); Note, 69 Harv. L. Rev. 1441, 1447 (1956).

Churchill, 135 U.S. 609, 615. To support its claim respondent had the burden of showing by clear and decisive proof that petitioner had made a false representation with intent to deceive; that the representation was not actually believed by petitioner, on reasonable grounds, to be true; that it was acted on by respondent to his damage, and that in so acting respondent was ignorant of its falsity, and reasonably believed it to be true. *Southern Dev. Co.* v. *Silva*, 125 U.S. 247; Prosser, Torts §86 at 523 and 527 (2d ed. 1955). Each of these elements involved factual determinations, peculiarly within the province of the jury. *Sonnentheil* v. *Moerlein Brewing Co.*, 172 U.S. 401, 410.

Petitioner categorically denied any intention to mislead or misrepresent (R. 460) and, as we will demonstrate, his testimony and other evidence at the trial substantially corroborated his denial.

The record established without contradiction, and respondent conceded, that petitioner was in fact an employee. He worked as a brakeman for respondent from 1957 to 1958, having previously worked in the same capacity from 1951 to 1956. He performed all the duties of such an employee, ran all the risks, received all the benefits, and was in every way indistinguishable from other employees.

Yet the trial court ruled that he was not an employee (R. 473). This anomaly it justified by finding that petitioner knew he had spondylolisthesis because he had been hospitalized in the Army and in January, 1946, was discharged on account of it, and had applied for VA benefits. By reasoning which it did not explain the court then stated it thought petitioner had a duty to reveal the condition, and if it had been known respondent would not have hired him. Although it did not so state, the court apparently

rejected all petitioner's testimony because it thought petitioner "lied completely all through this case" [4] (R. 472).

Respondent's essential claim is that petitioner misrepresented his back condition. It points to a number of questions which it says were falsely answered by petitioner in order to conceal this condition (R. 29-35). Some of these questions were in petitioner's application for employment[5] (Def. Ex. 4; R. 225, 480). Others were claimed to have been orally answered by him on questioning by respon-

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[4] If, as its language suggests, the court rejected all petitioner's testimony because it thought he lied, this was a flagrant disregard of the requirement that notwithstanding contradictions or inconsistencies in the testimony of a witness, its weight and credibility are for the jury. *Shelton* v. *United States*, 169 F.2d 665, 667 (D.C. Cir. 1948), *cert. denied*, 335 U.S. 834; *Norfolk & W. Ry.* v. *McKenzie*, 116 F.2d 632, 635 (6th Cir. 1941); *Matthews* v. *Atchison, T. & S. F. Ry.*, 54 Cal. App.2d 549, 555, 129 P.2d 435, 440 (Super. Ct. 1942); *Clark* v. *Union Pac. R.R.*, 70 Ida. 70, 211 P.2d 402 (1949).

[5] The questions and answers in the application for employment were as follows (R. 480):

"10. Give record of all previous employment in date order (include service with this Company, if any)

Name of Employer	Town or City, and State Where Employed	Occupation	FROM Mo. Yr.	TO Mo. Yr.	Reason for Leaving
Peerless Coal Co.	*Vivian, W. Va.*	*Miner, Brakeman*	*11 1948*	*7 1951*	*To get job with Railroad*

11. Give Military service and state whether honorably or dishonorably discharged or given a medical discharge. *U. S. Army. honorable discharged* [sic].

• • •

14. Have you ever been injured? If so when and at what place? *No*
How did it occur?
Extent of injuries?

• • •

17. What is the general condition of your health at present? *Good*"

dent's examining physician who testified he made notations of petitioner's answers* (Def. Ex. 5; R. 249, 483).

In answer to Question No. 10 on petitioner's 1951 application, relating to previous employment, including service with respondent, he listed Peerless Coal Co., from November, 1948 to July, 1951 and stated that he left "to get job with Railroad".

At the trial petitioner testified that in addition to Peerless Coal Co., he had previously worked for a number of companies, some of which he recalled and some of which he could not (R. 202, 217-220). He explained that in the application he listed only Peerless Coal Co. as previous employment because "your previous employment, the way I understand it, is the job you had before you came there" (R. 226, 227), and asked his cross-examiner, "you mean I should put down when I used to deliver papers and everything?" (R. 227).

The record also disclosed that when petitioner applied for employment with respondent in 1948, he listed U.S. Coal and Coke, and Vera Pocahontas as prior employers

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* The questions and answers claimed to have been given orally were as follows (R. 483):

"Have you ever had:

• • •

Rheumatism *No*

• • •

A medical discharge from the military service? *No (Honorable)*

Have you ever had a long or serious illness? *No*

What injuries have you ever received? *No*

Have you ever had Tumor, Ulcer, Physical Defect or been operated upon? *No*

If former employee, when employed? *No previous employment*

Have you ever been previously examined for employment, if so, when, where, and by whom was examination made?

If rejected, state cause of rejection. *None*"

(R. 487). Since respondent did not produce petitioner's 1943 application, the information he furnished at that time was not revealed.

As to his service with respondent, also referred to by Question No. 10, petitioner in his answer to Question No. 13, implied he had previously worked for respondent.[7] At the trial he remembered having been accepted for employment by respondent on an occasion prior to 1951, but did not remember when (R. 221, 222, 250, 255, 256, 264); he said he did not accept the job, which was as a laborer, because he wanted to be a brakeman (R. 256, 264, 265). Respondent introduced evidence that petitioner had applied for employment and had been physically examined and accepted in 1943 (Def. Ex. 8; R. 257, 491) and also in 1948 (Def. Ex. 6; R. 251, 486; Def. Ex. 7; R. 255, 488) and that on each occasion he had been given credit for a few hours on the job, entitling him on one occasion to $8.80 and on the other to $2.97 (R. 352, 353).

To Question No. 11 asking whether he had been honorably or dishonorably discharged or given a medical discharge from the Service, petitioner answered "honorable discharged" [sic]. Even though petitioner's certificate of "Honorable Discharge" was in evidence (Def. Ex. 3; R. 213, 477), respondent claims petitioner's statement that he had an honorable discharge from Military Service was false. To support this claim it points to the statement on the back of the Honorable Discharge certificate (R. 479), effective January 31, 1946, that the "Reason And Authority For Separation" was a Certificate of Disability for Dis-

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[7] "13. In connection with any previous application for employment were you subjected to a physical examination? Yes
If so, when, where, and by whom was examination made?
If rejected, state cause of rejection:
Dr. Murray Excepted" [sic]

charge; this Certificate stated that petitioner had spondylolisthesis, manifested by chronic pain in lower back (Def. Ex. 12; R. 304, 493).

In answer to Question No. 14, relating to injuries, petitioner stated he had never been injured (R. 481). At the trial he testified that he had no personal recollection but had been told by his mother that he had been in a childhood automobile accident (R. 209, 228, 253, 260). He understood that in the accident he hurt his side and believed he broke his ribs (R. 141, 142, 209), but that he "wasn't hurting" at the time he applied in 1951 (R. 228).

According to the Army and VA records petitioner stated while in the Army in 1946 and later to the VA that in 1941 he was "in automobile accident, acquired painful back, laid [sic] to sleep in special position on abdomen for 3 mon. because of pain" (Def. Ex. 18; R. 311, 500), and he had "pains in my right side, come from where I have had my ribs broken (last of 1941); has got bad since I have been in the Army" (Def. Ex. 13; R. 261, 305, 306, 495).

There was testimony by a doctor that X-ray of petitioner's ribs revealed no significant changes; that his ribs had nothing to do with petitioner's back condition (R. 75).

By Question No. 17, petitioner was asked: "What is the general condition of your health at present?" He answered "Good" (R. 482).

All the evidence which we outline in this brief, relating to petitioner's health, including his employment record, prior and subsequent to his application, may be said to bear upon petitioner's statement that his health was good in July, 1951.

Aside from the answers furnished by petitioner in his application, respondent claimed that he gave false information to its examining doctor. Petitioner denied that re-

spondent's physician asked him the questions and that he gave the answers recorded by the physician (R. 247-249). He stated that the physician examined and spoke to five or six other men at the same time (R. 223, 224). He admitted that his signature appeared on the card bearing the doctor's notations but explained that he signed a number of papers (R. 144, 248, 249) and said "they give us a bunch of papers to sign and tell us to go down and mark up for work" (R. 247).

In contrast, respondent's physician stated he had no personal recollection of petitioner or of examining him in 1951; he relied solely on his records (R. 408, 411). Explaining an admitted error in the date of the document on which he noted petitioner's alleged answers, he testified that at the time of the examination "I was being crowded; I had more than I could do" (R. 408). There was thus created an issue as to whether petitioner gave the medical examiner the information noted by him.

Even accepting the doctor's testimony, the evidence nevertheless furnished legitimate explanation of petitioner's answers. The information allegedly given by him was that he had never had a medical discharge from the military service, or received injuries, and that he had not previously been employed or examined by respondent.* Respondent also claimed petitioner falsely told the medical examiner that he never had rheumatism, a long or serious illness, or physical defect (R. 29 et seq.).

In his 1948 application for employment, following which he was employed by respondent, petitioner stated he had had rheumatism (R. 489). Moreover, the evidence, which revealed that he was confused as to whether he had rheu-

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* Questions dealing with these items also appeared in petitioner's application for employment and have been discussed.

matic fever of rheumatism, tended to show that he had suffered from such an ailment in 1941 or 1942 (R. 258, 261, 495), which he understood might have settled in his back (R. 262), but that the doctor who treated him "told me that I would probably outgrow it, and when my back quit hurting me, I thought I had outgrown it, and I haven't had any more trouble out of it until I got this lick" (R. 259, 280).

The plausibility of petitioner's testimony that he did not know he had a physical defect (R. 262) was reinforced by that of the doctors who agreed that spondylolisthesis is often congenital, and asymptomatic, and that many persons go through life without knowing they have it (R. 55, 79, 236, 240, 319, 322, 323, 442); that they are able to perform the most strenuous physical labor without limitation (R. 55, 57, 63, 320). Asked if his Certificate of Disability for Discharge from the Army was for spondylolisthesis, petitioner said "I don't know what I got it for. I know I got a C.D.D., a disability discharge, and this 'spondylo' thing, I don't know what you are talking about . . . I can't even say that word" (R. 214, 262).

Other evidence too corroborated petitioner's statement. For example, after his Army discharge, he received, for aggravation of this condition, a small pension (R. 142, 230; Def. Ex. 16; R. 309, 498), which he understood was for his side (R. 216, 228), and which was later terminated as "clearly and unmistakably erroneous" (R. 231; Def. Ex. 17; R. 310, 499); he was officially advised that his condition was "not a disability under the law" (R. 500). When cross-examined as to why his pension was stopped, petitioner answered: "They told me I was well" (R. 231). "I was under the impression I was well. I wasn't hurting" (R. 232, 228).

There was evidence that in 1947 petitioner, because he was having back pain, sought but was refused hospital

treatment from the VA (R. 299, 317). In December, 1950, he again applied to the VA for similar care. At that time the VA caused him to be examined by Dr. Higginbotham, of Bluefield, West Virginia (Def. Ex. 14; R. 308, 497, fol. 1688) (whose name he gave as reference when he applied for work), and though there was a diagnosis that he probably had spondylolisthesis, thereafter he was advised that the medical findings failed to show need for such hospital treatment or domiciliary care (Def. Ex. 15; R. 309, 497).

There was evidence that petitioner was in an Army hospital from January 10, 1946, to January 30, 1946, because he complained of a pain in his side and lower back and right side (R. 208, 211, 214). He stated he had been put in a ward "nothing like a hospital you have here . . . we walked around and shot pool . . . whatever recreation they have on the ward . . . ," (R. 215).

On this record there was no justification for depriving petitioner of his right to have the jury decide whether with intent to deceive respondent he had falsely stated a material fact which he believed to be true. Reasonably the jury may have concluded that petitioner had not made any representation not actually believed by him, on reasonable grounds, to be true; that he answered all questions in good faith and to the best of his belief.*

There can be no doubt of his statement that he had received an honorable discharge. That he understood the

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* In *Moulor* v. *American Life Ins. Co.*, 111 U.S. 335, 346, involving a claim by the beneficiary of a life insurance policy, it appeared that in applying for insurance the insured had not disclosed one or more ailments which he had, but there was a question as to whether he knew he had them. The Court held that not absolute accuracy, but good faith was required in answering the questions, and that whether the insured had knowledge of his condition should have been submitted to the jury as part of the question whether he made "fair and true answers". See also *Ettelson* v. *Metropolitan Life Ins. Co.*, 164 F. 2d 660, 665 (3rd Cir. 1947).

question regarding previous employment to refer only to his last employer was a reasonable explanation and that he intended no deceit was evidenced by his indication that he had been examined previously and by his listing other employers in an earlier application to respondent. His failure to list an injury in a childhood automobile accident, of which he had no independent recollection and from which he had recovered, seems hardly deceitful. There can be no serious complaint of his statement that the condition of his health at present was good; considering how long it had been since he had difficulty with his back, it would appear unreasonable otherwise to characterize the present condition of his health. Satisfactory performance of the duties of a brakeman for so many years following his application additionally confirmed the honesty of this opinion. See *Edwards* v. *United States*, 140 F.2d 526, 531 (6th Cir. 1944). If he did not tell the medical examiner that he had had rheumatism and assuming rheumatism and rheumatic fever are the same, the jury nevertheless may have found no fraudulent intent in this answer, in light of his having reported such a history in his 1948 application and his belief that he had recovered. See *Prudential Ins. Co.* v. *Gourley*, 267 F.2d 156, 158 (5th Cir. 1959); *United States* v. *Kelley*, 136 F.2d 823, 827 (9th Cir. 1943).

Reasonably too the jury may have concluded that no question asked petitioner to disclose his back trouble. Some of respondent's questions were so general as to be misleading, some were ambiguous, and some sought opinions,[10] not facts. No question specifically asked for the information, nor did any question seek the names of doctors who had

[10] Statements of opinion, in general, are not statements of fact, on which a claim of fraud may be premised. *Lehigh Zinc & Iron Co.* v. *Bamford*, 150 U.S. 665, 673; *Southern Dev. Co.* v. *Silva*, 125 U.S. 247, 250. In doubtful cases, whether a representation is one of fact or an expression of opinion is a question for the jury. 5 Williston, Contracts §1491 (rev. ed. 1937).

treated petitioner or hospitals in which he had been confined. The question regarding injuries did not call for the information about his back, since the ailment was congenital; the query as to the general condition of his health at present surely did not, since it was not troubling him. If petitioner reasonably was justified in his opinion that he never had a long or serious illness, that question did not call for the disclosure; and if petitioner, as he testified with reasonable support from the VA records,[11] did not know he had a "physical defect," that question did not.

For these reasons we submit the court had no right to rule as matter of law that petitioner made any false representation as to a material fact with knowledge of its falsity and with intent to deceive.

B. It was for the jury to decide whether petitioner's employment was because of respondent's reliance on his representations.

Aside from the issues involving the truthfulness of petitioner's statements and his knowledge and intent, which are discussed in the preceding section, the record presented for the jury a number of questions relating to respondent's conduct.

There was, for example, ample justification in the evidence for a reasonable finding that respondent's employment of petitioner at the time of the accident was not because of any reliance respondent had placed on his 1951 application. On the contrary the weight of the evidence was that the 1951 employment had been terminated in 1956, and

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[11] In support of petitioner's justification for relying on his advice from the VA that his condition was "not a disability under the law" and that medical findings showed no need for hospital or domiciliary case, see *United States* v. *Kelley*, 136 F.2d 823, 827 (9th Cir. 1943).

petitioner had been rehired in 1957, without reference to his 1951 application. Further, there was persuasive proof that respondent had or should have had notice of petitioner's back condition before it hired him in 1951, and that in any event it placed no reliance in 1951 on petitioner's claimed misrepresentations.

As we have stated, it was necessary for respondent, in order to support its defense of fraud, to establish by clear and convincing proof that it relied on petitioner's representations to its damage, and that it reasonably believed his representations to be true, *Southern Dev. Co.* v. *Silva*, 125 U.S. 247, 250, and whether there was such reliance was a question for the jury, *Clark* v. *Union Pac. R.R.*, 70 Ida. 70, 74, 211 P.2d 402, 405 (1949); Prosser, Torts §89 at 551 (2d ed. 1955).

It is well settled moreover that respondent's reliance must have been justifiable. There may be imputed to it "'knowledge of the result, which upon due inquiry, [it] . . . ought to have obtained, and thus the notion of reliance on the representations made to him may be excluded.'" *Farrar* v. *Churchill*, 135 U.S. 609, 616. Respondent will not be relieved of the consequences of its own inattention and carelessness; it may not put faith in representations the falsity of which, with reasonable care, it would have discovered; it cannot close its eyes to avoid discovery of the truth. *Andrus* v. *St. Louis Smelting & Refining Co.*, 130 U.S. 643; *Slaughter's Adm'r* v. *Gerson*, 80 U.S. (13 Wall.) 379, 383; *Casso* v. *Pennsylvania R.R.*, 219 F.2d 303 (3rd Cir. 1955); 1 Harper and James, Torts §7.12 (1956).

Where prudence dictates investigation, the complaining victim is required to investigate. *Shappirio* v. *Goldberg*, 192 U.S. 232. *A fortiori* he must do so if he has discovered something which should serve as a warning that he is being deceived. For this reason it is essential to consider

the special knowledge and experience of the one claiming fraud. *Dalhoff Const. Co.* v. *Block*, 157 Fed. 227 (8th Cir. 1907); Prosser, Torts §89 at 552 at n. 8; 1 Harper and James, Torts §7.13 at 584 (1956). And the duty to investigate applicants for employment is greater for interstate carriers than for many other employers, for they "owe a duty to their patrons as well as to those engaged in the operation of their railroads to take care to employ only those who are careful and competent to do the work assigned to them and to exclude the unfit from their service." *Minneapolis, St. P. & Ste. M. Ry.* v. *Rock*, 279 U.S. 410, 413.

On the other hand it is well settled that if one makes an investigation it may be reasonable to infer that he did not rely on the misrepresentations; the fact that he was unwilling to accept the statement without verification evidences that he did not believe it. *Shappirio* v. *Goldberg*, 192 U.S. 232, 241; *Farnsworth* v. *Duffner*, 142 U.S. 43, 47.

The question of reliance and all the related issues suggested by this résumé of elementary legal principles were raised by the evidence in this case, and each was a question for the jury. The trial court gave no consideration to any of these issues.

(1) Petitioner's employment in 1958 was not in reliance on his 1951 application.

Respondent fired petitioner in November, 1956, for deserting his crew and failing properly to perform his duties (R. 436; Pl. Ex. 22; R. 454, 475). In November, 1957, petitioner was reinstated, with his seniority unimpaired, but he was required to sign a waiver of all monetary or other claims, including those for time lost as a result of his discharge, and vacation rights (R. 436 et seq.; Pl. Ex. 21; R. 454, 474; Pl. Ex. 23; R. 455, 476). According to testi-

mony offered by respondent, when petitioner returned to respondent's employment in 1957, he was not physically examined, except as to vision (though there was a requirement that his hearing also be examined) (R. 419-424; Def. Ex. 32, R. 420, 510). And the evidence was that there was no record of any examination of petitioner, except as to vision (R. 437). Petitioner, however, testified he was physically examined (R. 145) and there was testimony by another employee who also had been discharged and later rehired, that the latter underwent a 30 minute physical examination (R. 382, fol. 1105).

From this it appears either that petitioner was examined and the results withheld, which surely would justify an inference that the examination revealed his defect, or that he was not examined, which would have constituted such gross carelessness on respondent's part as to defeat its defense. In either event the jury would have been justified, though the trial court ignored the issue, in finding no connection between the 1957 hiring and the 1951 representation.[13]

(2) Respondent knew or should have known of petitioner's condition.

Moreover respondent knew, or reasonably should have known, petitioner had a back deformity, since respondent did not accept petitioner's representations at face, but rather subjected him to a careful physical examination, which should have disclosed the condition.

Petitioner's spondylolisthesis was marked by an apparent physical abnormality, which he could not conceal. This con-

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[13] Similar situations have been considered in other cases, where it was held that in the second employment there could be no reliance on misrepresentation in obtaining the first employment. *Chiodo* v. *Whitehead & Kales Co.*, 327 Mich. 499, 42 N.W.2d 238 (1950); *Kansas City M. & O. Ry.* v. *Estes*, 203 S.W. 1155, 1160 (Tex. Civ. App. 1918), aff'd 228 S.W. 1087 (1921).

dition had existed for many years (R. 237, 319, 323, 431, 442). It was the kind of a condition often discovered coincidentally in routine examinations (R. 237). According to a doctor who examined petitioner at respondent's request after the accident, the condition was the same at the time of trial as it was "way back in the middle forties" (R. 241, 243). In 1947, a VA examiner had found a "prominent sacrum with a hollow back" (R. 316).

After the accident he was found to have a depression, "a little jog", in his lower back, which was readily seen and felt (R. 75, 235, 236, 431). Also the lower curve in his back was very much more marked than normal (R. 54, 57, 75, 456, 457). To an examining doctor, this indicated spondylolisthesis, even without X-rays (R. 57).

Though these indications of spondylolisthesis existed when petitioner was examined for employment in 1951, respondent's medical examiner did not note them. According to him, the physical qualifications for brakemen were the highest the railroad required and, though "at that time" respondent made no X-rays in pre-employment examination (R. 410), he characterized his examination of petitioner as "thorough" [11] (R. 405, 411, 422). Yet he failed to detect the obvious symptom of petitioner's condition (R. 423). Some light may have been shed on this omission by his testimony that at the time of his examination "I was being crowded; I had more than I could do" (R. 408).

This evidence amply supported the conclusion that respondent did not rely on petitioner's representations, but rather on its own examination, and that by that investiga-

[11] He also characterized his examination as a screening examination (R. 410). There was testimony from petitioner and another examined at the same time that they were stripped (R. 246, 382). The other worker stated he was requested to bend and touch the floor and he believed the doctor felt his back (R. 382).

tion it was charged with knowledge of petitioner's back condition.

The jury would have been reasonable also if it had found that respondent was charged with knowledge of the claimed fraud by petitioner's prior applications for employment, which referred to his having had rheumatism. It may have found that respondent was put on notice too by petitioner's statement, when asked to state the cause of rejection, if rejected in connection with previous applications for employment, that he had been "Excepted". If respondent's testimony is believed, that petitioner's sick record while in the service of respondent was marked by extraordinary absence (R. 375, 506-509), this too was sufficient to put it on notice of defective physical condition.

(3) Respondent did not rely on petitioner's representations when it hired him in 1951.

The record also plainly excluded the notion that respondent hired petitioner in 1951, in reliance on his representations. On this issue the only reasonable conclusion from the evidence was that respondent relied, not on petitioner's representations, but on its observation and examination of petitioner; that its examination was careless; that it shut its eyes in order to avoid discovery of the truth, and became estopped to claim it was misled.

Respondent's application form called for petitioner's age, address, relatives, education, and certain information about his physical history and condition. It also called for references which petitioner furnished. On the reverse side of the form was written: "This man has worked in mines and dropped cars around tipple, also neat and clean in appearance" (R. 483).

Elementary caution dictates some investigation in hiring any employee. Respondent recognized its duty to take care

to exclude the unfit from its service, *Minneapolis* v. *Rock*, 279 U.S. 410, 413, by requiring names of former employers and references, by its insistence on a "thorough" physical examination and by its rule allowing thirty days for investigation.[14] In setting different standards for medical examinations, it recognized too that the need to investigate is especially felt when hiring a brakeman entrusted with the personal safety of *himself* and others and with the handling of expensive equipment in a hazardous industry. Yet apparently it made no investigation, before or after petitioner was hired, even of the questionable items on the face of petitioner's application.[15]

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[14] Article 17(e) of Rates of Pay and Regulations, Norfolk & Western Ry. Co. (Rev. 1943), in force at the time petitioner was hired, specified:

"Applications for employment will be accepted or rejected within thirty (30) days. If not notified within thirty (30) days, applicant will be considered as accepted."

These regulations were not introduced in evidence, but they were the subject of agreement between respondent and the Brotherhood of Railroad Trainmen, and were furnished by respondent to its employees.

In *Minneapolis, St. P. & S. Ste. M. R.R.* v. *Borum*, 286 U.S. 447, 449, the Court held, under an identical rule, that the railroad "did not, without more, have the right to remove plaintiff from its service on account of such misrepresentation [as to age]." See *Carter* v. *Peoria & P. U. Ry.*, 275 Ill. App. 298 (1934); *Blanton* v. *Northern Pac. Ry.*, 215 Minn. 442, 447, 10 N.W.2d 382, 385 (1943).

[15] In his application (R. 480), petitioner stated he had left his prior employment to take a job with a railroad, a job apparently he did not have. If he did have the job before he filed his application, of course, there was no reliance on his application. *Casso* v. *Pennsylvania R.R.*, 219 F.2d 303, 304 (3rd Cir. 1955). If, on the other hand, he left his prior job for a job he did not have, this was plainly a suspicious circumstance calling for investigation.

Petitioner also gave as reference the name of Dr. Higginbotham, a doctor who examined for the VA in Bluefield, West Virginia (R. 482, fol. 1688).

Asked if he had been physically examined in connection with any previous examination for employment and rejected, petitioner said: "Excepted" [sic] (R. 481).

It is difficult to conceive of any justification for respondent's failure to carry out its duty to make an investigation of petitioner's application.[16] If it had, it would have discovered petitioner's condition. In its haste to employ petitioner, respondent hired him on the day he applied in 1951 (R. 373) and failed even to check its own records (where it would have learned of his history of rheumatism and of other places he had worked), or to require petitioner to present his "honorable discharge" (which would have disclosed the Certificate of Disability for Discharge), nor did it phone the local VA doctor given as reference (though use as reference of a doctor who examined for the VA suggested some health problem).

To effectuate its duty to exercise care in hiring, respondent relied solely on the physical examination by its medical examiner. Its insistence on a "thorough" examination was of course a recognition that good sense forbade blind reliance on the application, and reasonably suggested respondent was relying on the examination, not the petitioner's statements. The inadequacy of the examination,[17]

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[16] The necessity of careful investigation of applicants, in addition to physical examination, has been the subject of discussion in the industry for many years. Tate, *The Physical Fitness and Judicious Selection of New Employees*, 32 The Bulletin, The Association of Railway Claim Agents, 291-299 (Jan. 1948); Copp, *How Best to Check Up Applications for Train and Switching Service—What Safeguards Should Be Employed*, Thirty-eighth Annual Meeting of the Association of Railway Claim Agents, 81, 82 (1927). These industry discussions emphasize that prudence dictates careful investigation; that "meticulous inquiry into applicant's references and previous employment history are indispensable requirements." Tate, *The Physical Fitness and Judicious Selection of New Employees*, *supra*, at 291.

[17] That the examination was superficial was suggested by the medical examiner, despite his testimony to the contrary, when he testified he had more than he could do (R. 408).

Regardless of his characterization of the examination, however, the jury may have found any physical examination of a brakeman

however, demonstrated that though respondent had no intention of relying on petitioner's representations, the procedure it set up for investigation was not calculated to disclose obvious defects such as spondylolisthesis. Whether this was deliberate or from lack of care, the plain inference remained that respondent was relying on its investigation, not on petitioner's representations.

Respondent is a well established carrier. At its disposal were extensive resources for physical examination and investigation of applicants' references and prior employers. Considering its special knowledge and experience, it is incongruous indeed to have respondent claim that it was defrauded by petitioner, a laborer who submitted himself to all the examination and investigation requested by respondent, and whose physical defect was apparent on physical examination and repeatedly referred to in official records concerning him.

The only reasonable inference from the evidence was not that respondent was defrauded, but rather that it was careless or calculating. The record compels the conclusion that respondent shirked its duty as an employer, and especially as an employer in the dangerous work of railroading. It therefore was charged with the knowledge that even the slightest inquiry would be uncovered. On the issue of fraud in procuring employment, therefore, not respondent, but petitioner was entitled to a directed verdict.

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to be inadequate without X-rays. This was implied by the doctor's testimony that at the time petitioner was examined in 1951 the railroad did not make X-rays (R. 410); presumably he meant that as of some subsequent date respondent commenced to X-ray applicants. This is a likely inference, since back X-rays in pre-employment examinations have been urged as a necessary precaution and have been required by many carriers. *X-rays of the Spine in Pre-Employment and Periodic Examinations*, Proceedings of the Thirty-seventh Annual Meeting of the Medical and Surgical Section, Association of American Railroads, 45-54, 61, 62 (1957).

II

The Trial Court Erroneously Interpreted the Law in Directing a Verdict for Respondent.

Assuming, but not conceding, that the evidence had been such as to justify a finding that petitioner obtained employment by fraud, petitioner nevertheless was entitled to the protection of the FELA.

Since petitioner admittedly was hired by respondent and for more than five years performed his duties satisfactorily, he surely could not be deprived of the benefits of the law in the absence of some overriding consideration to the contrary. And in appraising his status it is significant that the FELA was enacted primarily for the benefit of railroad workers who found themselves without safeguard in the hazardous industry in which they worked, and that the statute is to be interpreted liberally for the protection of the workers.[18] *Kernan* v. *American Dredging Co.*, 355 U.S. 426, 432; Griffith, *The Vindication of a National Public Policy Under the Federal Employers' Liability Act*, 18 Law & Contemp. Prob. 160 (1953). Moreover, "employee" is not

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[18] That Congress intended no technical restriction of its coverage may be indicated by its provision that there shall be liability in damages "to any person suffering injury while he is employed by such carrier"; by its exact words therefore the Act does not, as did its predecessor, 32 Stat. 232, cause the liability to run to any of its employees. 45 U.S.C. §51. This change in language may have manifested a deliberate purpose to cover those working for carriers, whether or not they were employees in a technical sense. See dissenting opinion of Mr. Justice Clarke in *Hull* v. *Philadelphia & R. Ry.*, 252 U.S. 475, 488, in which he said:

> "The Federal Employers' Liability Act does not require that a person shall be in the exclusive employ of a railroad common carrier in order to come within its scope. It provides that such carrier shall be 'liable in damages to any person suffering injury *while he is employed* [*engaged*] *by such carrier in such commerce*'. . . ." [Italics and brackets in original.]

used in the Act in any special sense. General principles apply in determining who is an employee, *Baker* v. *Texas & Pac. Ry.*, 359 U.S. 227, 228; *Hull* v. *Philadelphia & R. Ry.*, 251 U.S. 475, 479; *Robinson* v. *Baltimore & O. R.R.*, 237 U.S. 84, 94.

Respondent argued to the trial court that petitioner was not entitled to recover because his employment contract was void, and he therefore was not an employee. If it be considered, as respondent contends, that petitioner's employment in 1958 was pursuant to his 1951 application, the express terms of that contract plainly signified that his status was voidable, not void. The application form did not provide that misrepresentation would void his status as an employee; it stated that a false statement or misrepresentation would justify dismissal[19] (R. 482), and respondent so construed the contract by its dismissal of petitioner, after a hearing, in December, 1959, "for falsifying application for employment as Yard Brakeman and false statements made in connection with physical examination for employment, July 24, 1951" (R. 39).

This interpretation by respondent accorded with the well recognized principle that fraud in the inducement of a contract renders it voidable, not void. And a voidable contract is operative until rescinded. *Payne* v. *Daugherty*, 283 Fed. 353 (8th Cir. 1922); *Laughter* v. *Powell*, 219 N.C. 689, 14 S.E.2d 826, 136 A.L.R. 1116 (1941), *cert. denied*, 314 U.S. 666; 5 Williston, Contracts §1488 (rev. ed. 1937). It is only when fraud occurs in the factum, when a contracting party, through fraud, is led to do something other than

[19] At the foot of petitioner's 1951 application, above his signature, appeared the following statement, as part of the printed form (R. 482):

"I fully and definitely understand that any false statement or misrepresentation herein will justify my dismissal from the service without an investigation hearing, regardless of when such fact may be discovered by the Company."

that which he thinks he is doing, that a contract is deemed void from its inception. 3 Pomeroy, Equity Jurisprudence §899 at 543, 544 (5th ed. 1941); 5 Williston, Contracts §1488 at 4154 (rev. ed. 1937); 2 Restatement of Contracts, §475 at 905 (1932).

These principles are exemplified in *Payne* v. *Daugherty*, 283 Fed. 353 (8th Cir., 1922), a personal injury action under the FELA, resulting from an employee's fall, in which the court affirmed the exclusion of evidence tendered in support of a defense that the employee had procured employment *inter alia* by concealing a history of epilepsy to which his fall was attributed. The Court recognized the right of the railroad to attribute the plaintiff's fall to prior injury or affliction but held:

> "That is far different from permitting a retroactive dissolution of the relation of master and servant, by virtue of the contract, which, even if voidable, was, while it subsisted, attended with the duty, required by law, for the safety of the latter . . . . We regard the decisions such as Lupher v. Atchison, T. & S. F. Ry. Co., 81 Kan. 585, 106 Pac. 284, 25 L. R. A. (N.S.) 707, as declaring the sound and just rule, namely, that there is liability to the employee, notwithstanding the inducement to the contract. Furthermore, this action was brought under the federal Employers' Liability Law . . . and the fault of the defendant was alleged under the Safety Appliance Acts . . . . And in our opinion we should hold that the defense urged was not available, in view of the positive terms of Sections 1 and 5 of the former act." 283 Fed. at 354.

But respondent contends that *Minneapolis* v. *Rock*, 279 U.S. 410, supports its position. Rock's application for employment was rejected because of his poor physical con-

dition. A few days later he reapplied and, concealing his true identity, was accepted subject to physical examination. He procured a friend to take the physical examination and believing he had examined the petitioner, the examining physician reported favorably on the application. About 15 months later Rock was injured. He brought suit and secured a verdict under the FELA. The judgment was affirmed by a state court, but reversed by this Court.

It has been ably argued that the *Rock* decision confused the consequences of fraud in the inducement and fraud in the factum and otherwise failed to accord with accepted judicial rationale and that it should be reversed.[20] Since it may be reasoned that the railroad had no intention to contract with Rock, but thought it was hiring the man who took

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[20] "Not only, therefore, is the rule adopted in the *Rock Case* out of harmony with the general principles of law governing the master-servant relationship and with the current of prior decisions in similar cases; it is also out of harmony with the accepted judicial rationale of the employer-employee relationship under the Employers' Liability Act and it fails to promote any purposes of expediency which might justify the departure from logical harmony with the course of decision elsewhere . . . [T]he purpose of the Employers' Liability Act was . . . to place upon the industry the duty of caring for the human sacrifices to the demands of the machine age in a manner more satisfactory to modern thought than that provided by the rules of the common law. Employees, injured by the employers' negligence, come under the protection of its terms. *Rock* answers to that description, and it seems a perversion of the purpose of the Act to place him beyond the pale merely because he lied to get his job." Merrill, *Misrepresentation to Secure Employment*, 14 Minn. L. Rev. 646, 656 (1930); see also 43 Harv. L. Rev. 141 (1930); 28 Mich. L. Rev. 357 (1930); 14 Minn. L. Rev. 98 (1930).

As stated in *Boshaw* v. *J. J. Newberry Co.*, 259 Mich. 333, 337, 243 N.W. 46, 47 (1932):

> "While in Federal decisions there seems to be a trend to the contrary (see *Minneapolis, etc., R. Co.* v. *Rock*, 279 U.S. 410 [49 Sup. Ct. 363]), the weight of authority in State courts sustains the right of an employee to compensation notwithstanding he secured the employment through fraud or misrepresentation as to his physical condition, former discharge, age, etc."

the physical examination, it may be said also that in *Rock* there was fraud in the factum, which would have justified a finding that the employment contract was void, rather than voidable. See *Qualls* v. *Atchison, T. & S. F. Ry.*, 112 Cal. App. 7, 17, 296 P. 645, 650 (App. Div. 1931); *Plick* v. *Toye Bros. Auto & Taxicab Co.*, 13 La. App. 525, 537, 127 So. 59, 66 (1930).

Careful reading of *Rock*, however, establishes that it was not considered in conventional terms of the effect of fraud on a contract. There is no suggestion of an intention to alter the rule of *Payne* v. *Daugherty*, 283 Fed. 353 (8th Cir. 1922). It did not determine that Rock was not an employee; it held that he was not of right an employee within the meaning, or entitled to the protection, of the FELA. Rock was not deprived of the benefits of the FELA merely because he concealed his physical condition. As the Court explained in *Minneapolis, St. P. & S. Ste. M. R.R. Co.* v. *Borum*, 286 U.S. 447, 449, Rock was foreclosed because he obtained employment "by fraudulently evading the company's rule requiring applicants to submit to a physical examination. . . ." This evasion was found to be irreconcilable with the carrier's duty to patrons and employees to take care to employ only competent workers, and consequently with public policy. In other words, if the railroad could not examine Rock, it could not use the care the law required of it. The Court held:

> "The deception by which he subsequently secured employment set at naught the carrier's reasonable rule and practice established to promote the safety of employees and to protect commerce. It was directly opposed to the public interest because calculated to embarrass and hinder the carrier in the performance of

its duties and to defeat important purposes sought to be advanced by the Act. 279 U.S. at 414.

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"Right to recover may not justify [sic] or reasonably be rested on a foundation so abhorrent to public policy." 279 U.S. at 415.

The essence of the holding therefore was that an employee may not recover under the FELA if his employment is found to be against the public policy inherent in that Act. *Plick* v. *Toye Bros. Auto & Taxicab Co.*, 13 La. App. 525, 537, 127 So. 59, 66 (1930); *Ganga* v. *Ford Motor Co.*, 250 Mich. 247, 249, 230 N.W. 159 (1930); *Texas & N. O. R.R.* v. *Webster*, 123 Tex. 197, 70 S.W.2d 394 (1934), *cert. denied*, 293 U.S. 580; *Fort Worth & D.C. Ry.* v. *Griffith*, 27 S.W. 2d 351, 353 (Tex. Civ. App. 1930). So interpreted *Rock* states a well established principle. *Ritter* v. *Mutual Life Ins. Co.*, 169 U.S. 139, 154; *United States Bank* v. *Owens*, 27 U.S. (2 Pet.) 527, 538.[21]

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[21] Soon after *Rock* this Court decided *Minneapolis, St. P. & S. Ste. M. R.R.* v. *Borum*, 286 U.S. 447, a personal injury action under the FELA, defended on the ground that the worker falsely understated his age. *Borum*, as we have noted, paraphrased *Rock* as holding that one who obtained employment by fraudulently evading the company's rule requiring applicants to submit to a physical examination could not maintain an action for injury under the FELA. The Court noted Borum's physical fitness, his 7 years of satisfactory service and the fact that neither his age nor his physical condition contributed to cause his injury. It deprecated the materiality of his misrepresentation and the railroad's reliance upon it and was influenced by the point that under its 30-day rule the railroad could not, without more, remove petitioner from its service for misrepresentation. In the same vein, it pointed out that his physical condition was not shown to be such as to make his employment inconsistent with the carrier's discharge of its duty to select fit employees. On this basis it found the case not within the rule of *Rock*. It is apparent therefore that in *Borum* there was no purpose to extend the rule of *Rock*.

This reasoning does not deprive petitioner of his right to the protection of the FELA. On the contrary it requires that he be given that protection. If the facts be assumed against him, he concealed a physical defect, but he did not "set at naught the carrier's reasonable rule and practice established to promote the safety of employees and to protect commerce." 279 U.S. at 414. He did not make it impossible for the carrier to examine him and to carry out its duty to exercise care in hiring. On the contrary he submitted himself to such physical examination as respondent chose to give and afforded it full opportunity to exercise all the care it chose to exercise in selecting him. And, as we have established, even the most cursory investigation would have uncovered what is now claimed to have been a fraud.

To deprive petitioner of the protection of the FELA would not, in the language of *Rock*, stimulate carriers to proper performance of their duty to exercise care in hiring. Such an extension of the rule would negate the very philosophy which *Rock* protects. It would put a premium on laxity. It would encourage a carrier to minimize its care in hiring, secure in the hope that, if an injury occurred, it might discover some misrepresentation, and in the knowledge that such evidence would preclude relief. The purpose of the FELA requires that petitioner not be deprived of the protection of that Act.

Since *Rock* was decided it has been discussed in a number of cases dealing with fraud in procuring employment as a defense to personal injury proceedings by employees.[22] In

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[22] In a number of these cases the only claimed misrepresentation related to the age of the employee, which was understated in *Boshaw* v. *J. J. Newberry Co.*, 259 Mich. 333, 243 N.W. 46 (1932); *Ganga* v. *Ford Motor Co.*, 250 Mich. 247, 230 N.W. 159 (1930); *Laughter* v. *Powell*, 219 N.C. 689, 14 S.E.2d 826, 136 A.L.R. 1116 (1941), *cert. denied*, 314 U.S. 666, and overstated in *Long* v. *Big Horn Construction Co.*, 75 Wyo. 276, 295 P.2d 750 (1956); *New-*

general they have followed the traditional reasoning that misrepresentation in procuring employment may give rise to a right of rescission by the employer, but does not void his status.[23] In some the misrepresentation has been found

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kirk v. *Los Angeles Junction Ry.*, 21 Cal.2d 308 at 320, 131 P.2d 535 at 543 (1942); *Matthews* v. *Atchison, T. & S. F. Ry.*, 54 Cal. App.2d 549, 129 P.2d 435 (Super. Ct. 1942); *Powers* v. *Michigan Cent. R.R.*, 268 Ill. App. 493 (1932); *Plick* v. *Toye Bros. Auto & Taxicab Co.*, 13 La. App. 525, 127 So. 59 (1930). In some, other information has been involved, such as name or identity: *Eresafe* v. *New York, N. H. & H. R.R.*, 250 F.2d 619 (2nd Cir. 1957); *Matthews* v. *Atchison, T. & S. F. Ry., supra; Phillips* v. *Southern Pac. Co.*, 14 Cal. App.2d 454, 58 P.2d 688 (App. Div. 1936); *Plick* v. *Toye Bros. Auto & Taxicab Co., supra; Ganga* v. *Ford Motor Co., supra;* prior employment, discharge by prior employer, references, and claims against prior employers: *Eresafe* v. *New York, N. H. & H. R.R., supra; Matthews* v. *Atchison, T. & S. F. Ry., supra; Phillips* v. *Southern Pac. Co., supra; Qualls* v. *Atchison, T. & S. F. Ry.*, 112 Cal. App. 7, 16-18, 296 P. 645 (App. Div. 1931); *Powers* v. *Michigan Cent. R.R., supra; Dawson* v. *Texas & Pac. Ry. Co.*, 123 Tex. 191, 70 S.W.2d 392 (1934); *cert. denied*, 293 U.S. 580 (1934); *Texas & N. O. R.R.* v. *Webster*, 123 Tex. 197, 70 S.W.2d 394 (1934), *cert. denied*, 293 U.S. 580; *Fort Worth & D. C. Ry.* v. *Griffith*, 27 S.W.2d 351 (Tex. Civ. App. 1930). A number have involved claims of misrepresentation of physical condition, either solely or along with other facts: *Eresafe* v. *New York, N. H. & H. R.R., supra; Casso* v. *Pennsylvania R.R.*, 219 F. 2d 303 (3rd Cir. 1955); *Talarowski* v. *Pennsylvania R.R.*, 135 F. Supp. 503 (D. Dela. 1955); *Carter* v. *Peoria & P. U. Ry.*, 275 Ill. App. 298 (1934); *Clark* v. *Union Pac. R.R.*, 70 Ida. 70, 211 P.2d 402 (1949); *White* v. *Thompson*, 181 Kan. 485, 312 P.2d 612 (1957); *Powers* v. *Michigan Cent. R.R., supra; Blanton* v. *Northern Pac. Ry.*, 215 Minn. 442, 10 N.W.2d 382 (1943); *Dawson* v. *Texas & Pac. Ry., supra; Fort Worth & D. C. Ry.* v. *Griffith, supra.*

It is interesting to note that in all but three of these cases, the decision has been favorable to the employee: *Talarowski* v. *Pennsylvania R.R., supra*, in which a pretrial motion to strike the defense of fraud was denied, because it involved jury questions; *Clark* v. *Union Pac. R.R., supra*, in which the issue of reliance was held to be a jury question; and *Fort Worth and D. C. Ry. Co.* v. *Griffith, supra*, in which the court's logic plainly was imperfect.

[23] *Matthews* v. *Atchison, T. & S. F. Ry., supra; Phillips* v. *Southern Pac. Co., supra; Plick* v. *Toye Bros. Auto & Taxicab Co., supra; Blanton* v. *Northern Pac. Ry., supra, Laughter* v. *Powell, supra;*

immaterial.[24] In some it was recognized that the defense was without merit if the employer knew or should have known the true facts.[25] Others have recognized that *Rock* was based on the strong public policy that care be exercised in hiring fit employees.[26]

Where physical condition has been an issue, emphasis has been placed upon the actual physical fitness of the employee; in this connection the courts have often adverted, as evidence of fitness, to the number of years of satisfactory work performed by the employee, and to the fact that the worker was physically examined and passed.[27] On this point Rock's case has been distinguished on the ground that he was not physically examined.[28] Basically the cases reflect a refusal to take from the bona fide worker the benefits of the FELA, and an unwillingness to relieve the railroads of responsibility for their negligence.[29]

Dawson v. *Texas & Pac. Ry. Co., supra; Texas & N. O. R.R.* v. *Webster, supra; Long* v. *Big Horn Construction Co., supra;* Annot. *Misrepresentations in Seeking Employment,* 116 A.L.R. 1116 (1942).

[24] *Powers* v. *Michigan Cent. R.R., supra; Qualls* v. *Atchison, T. & S. F. Ry., supra.*

[25] *Eresafe* v. *New York, N. H. & H. R.R., supra; Casso* v. *Pennsylvania R.R., supra; Phillips* v. *Southern Pac. Co., supra; Carter* v. *Peoria & P. U. Ry., supra; White* v. *Thompson, supra; Ganga* v. *Ford Motor Co., supra; Blanton* v. *Northern Pac. Ry., supra.*

[26] *White* v. *Thompson, supra; Plick* v. *Toye Bros. Auto & Taxicab Co., supra; Ganga* v. *Ford Motor Co., supra; Texas & N. O. R.R.* v. *Webster, supra; Fort Worth & D. C. Ry.* v. *Griffith, supra.*

[27] *Newkirk* v. *Los Angeles Junction Ry., supra; Matthews* v. *Atchison, T. & S. F. Ry., supra; Carter* v. *Peoria & P. U. Ry., supra; White* v. *Thompson, supra; Blanton* v. *Northern Pac. Ry., supra; Laughter* v. *Powell, supra; Texas & N. O. R.R.* v. *Webster, supra; Long* v. *Big Horn Construction Co., supra.*

[28] *Eresafe* v. *New York, N. H. & H. R.R., supra; Qualls* v. *Atchison, T. & S. F. Ry., supra; Carter* v. *Peoria & P. U. Ry., supra; Plick* v. *Toye Bros. Auto & Taxicab Co., supra; Ganga* v. *Ford Motor Co., supra.*

[29] See especially *Phillips* v. *Southern Pac. Co., supra.*

Many courts have sought to derive from *Rock* and *Borum* a criterion to apply to the defense of fraud in procuring employment, though no court has found the facts before it within the rule it stated. Taking phrases from *Rock* and *Borum* out of context, some have phrased the test in terms of false representation of such character that it substantially affected the examining surgeon's conclusion that the employee was in good health and acceptable physical condition,[30] or of such character as to have been a substantial factor in the hiring.[31] As an element of the defense a number of courts have imposed a requirement that the employee be in fact physically unfit for employment and that such unfitness be a cause of the accident.[32] Some have said the contract will be void and recovery precluded only if there is a causal connection between the accident and the misstatements.[33] One opinion interpreted *Rock* to mean no recovery may be permitted because the contract is void if there is positive and affirmative fraud, even though unrelated to physical condition.[34]

These courts have missed the basic point that Rock was precluded because he set at naught the carrier's reasonable rules and practice established to promote safety; he prevented the railroad from exercising care in hiring. The materiality of his misrepresentations and the railroad's reliance upon them were of no necessary consequence in *Rock*.

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[30] *Casso* v. *Pennsylvania R.R., supra; Southern Pac. Co.* v. *Libbey*, 199 F. 2d 341 (9th Cir. 1952).

[31] *Talarowski* v. *Pennsylvania R.R., supra.*

[32] *Plick* v. *Toye Bros. Auto & Taxicab Co., supra; Ganga* v. *Ford Motor Co., supra; Blanton* v. *Northern Pac. Ry., supra.*

[33] *Matthews* v. *Atchison, T. & S. F. Ry., supra; Phillips* v. *Southern Pac. Co., supra; Clark* v. *Union Pac. R.R., supra; Long* v. *Big Horn Construction Co., supra.*

[34] *Fort Worth & D. C. Ry.* v. *Griffith, supra.*

The controlling feature, as we have emphasized, was that his fraud prevented the railroad from performing its duty to its other employees and to the public. His fraud in reality resulted in a contract which was contrary to a strong public policy.

In this connection respondent makes much of the fact that petitioner's injuries were sustained at the part of his body where his defect existed. To bolster this argument it points to cases stating there can be no recovery if there is a causal connection between the misstatement and the injury. These opinions, however, refer to the happening of the accident, not the existence of the injury. In *Matthews* v. *Atchison, T. & S. F. Ry.*, 54 Cal. App. 2d 549, 129 P. 2d 435 (Super. Ct. 1942), where the employee understated his age and there was evidence that the effect of his injury was more serious because of his age than if he were younger, the court specifically held that the requirement of causal connection related to the happening of the accident, not its effect.[11] That the employee sustained injury to his elbow, where he had a prior existing condition, just as petitioner did, was held to relate only to the amount of his recovery.

But this discussion misses the mark. There is no problem of connecting misstatements with the accident or injury. Unless the fraud is deemed to violate public policy, as Rock's did, the applicant becomes an employee and though his contract may be subject to rescission, he may not be barred from recovery under the FELA. On this view it is immaterial whether there was any relationship between the misstatement and the accident or injury.

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[11] See also *Long* v. *Big Horn Construction Co.*, *supra*.

Conclusion

For these reasons we submit the action of the trial court was erroneous and should be reversed and this case remanded with instructions to the trial court to entertain favorably a motion by petitioner to strike the defense of fraud heretofore interposed by respondent.

Respectfully submitted,

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